No. 18–459

IN THE

Supreme Court of the United States

EMULEX CORPORATION, ET AL.,
Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members, and indirectly represents an underlying membership of more than

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel contributed money to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of concern to the nation's business community, including cases under the federal securities laws.

Business Roundtable is an association of chief executive officers of leading U.S. companies working to promote a thriving U.S. economy and expanded opportunity for all Americans. Business Roundtable members lead companies that together have more than $7 trillion in annual revenues, employ more than 15 million employees, invest nearly $150 billion in research and development, and pay nearly $300 billion in dividends to shareholders. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formation of public policy, and the organization regularly participates in litigation as *amicus curiae* when important business interests are at stake.

Both *amici* have a strong interest in this case because private securities class action litigation imposes a significant burden on their members and adversely affects their access to capital markets. In particular, their members frequently engage in mergers and acquisitions transactions. As a result, they face precisely the sorts of lawsuits that now invariably attend such transactions—including lawsuits brought in federal court under provisions of the federal securities laws, such as Section 14(e) of the Securities Exchange Act of 1934, the provision at issue here.

SUMMARY OF ARGUMENT

There was once a time when federal courts routinely engrafted damages remedies onto statutes that didn't have them, on the theory that doing so would make the laws more effective. But that era ended decades ago, in 1975, when this Court made congressional intent the touchstone for recognizing causes of action in federal statutes. *See Cort* v. *Ash*, 422 U.S. 66, 77–85 (1975). Ever since then, the Court has consistently declined to create rights of action under the securities laws. In 1977, the Court refused to recognize a private right of action in favor of defeated tender offerors under Section 14(e) of the Securities Exchange Act—the very provision at issue here. *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 24–42 (1977). And in a pair of decisions in 1979, the Court rejected rights of action under Section 17(a) of the Exchange Act and Section 206 of the Investment Advisers Act of 1940. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568–79 (1979); *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15–16 (1979). In one of those cases, the Court recognized that, under the abandoned, free-wheeling, pre-1975 approach to inferring private rights of action, "virtually every provision of the securities Acts" would have "an implied private cause of action." *Touche Ross*, 442 U.S. at 577. The Court understandably refused to accept that untenable result.

The correct approach today, of course, recognizes that Congress makes the laws. It requires judges to "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) (citation omitted). Under that standard, *Touche Ross* and *Transamerica*

control here: Just like the provisions at issue in those cases, Section 14(e) contains no private right, not even the slightest hint that Congress ever imagined one. And it matters not that, before 1975, under the abrogated approach, the Court had recognized private rights under Sections 10(b) and 14(a) of the Exchange Act: "Not even when interpreting the ... Securities Exchange Act of 1934 ... have we applied [the former] method for discerning and defining causes of action. Having sworn off the habit of venturing beyond Congress's intent, we will not accept [an] invitation to have one last drink." *Id.* at 287 (citations omitted). There is no reason for the Court to depart from that course here.

In any event, as a practical matter, the costs of a Section 14(e) private right of action vastly outweigh the benefits. A review of Section 14(e) class-action litigation filed over the past twenty-three years shows what Section 14(e) has increasingly and largely become: a vehicle through which plaintiffs' lawyers extract attorneys' fees from corporate acquisitions involving tender offers, by bringing cursory litigation that benefits no one but themselves. At the same time, the elimination of Section 14(e) private litigation would not deprive investors of any substantial protection, because tendering shareholders could still pursue damages claims for fraud under Section 10(b) and Rule 10b–5. Finally, as the tortuous history of Section 10(b) and Rule 10b–5 illustrates, inferring a private right of action under Section 14(e) could once again require this Court repeatedly to guess what Congress's hypothetical intent would have been in defining the scope of a cause of action Congress never intended to create—an awkward, difficult, and ultimately futile endeavor, one that this Court wisely abandoned decades ago, and should refuse to revive here.

ARGUMENT

I. NO BASIS EXISTS FOR INFERRING A PRIVATE RIGHT OF ACTION UNDER SECTION 14(e).

Petitioners are correct that, if the Court infers a private right of action under Section 14(e), that right of action should require proof of scienter, and not mere negligence. Pet. Br. 22–42. But petitioners are also correct that, ultimately, the Court should infer no right of action under Section 14(e). *Id.* at 42–51.

And that more fundamental point is the ground upon which the Court should decide this case. Recognizing a private right of action under Section 14(e) would contravene over four decades of decisions of this Court holding that "[i]f the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856 (2017) (quoting *Sandoval*, 532 U.S. at 286–87). Section 14(e)'s text contains no express right of action. And nothing in the statute otherwise reflects any congressional intent to create such a right. The Court should adhere to its precedents, follow Congress's intent, and hold that no private right of action under Section 14(e) exists.

A. Since 1975, this Court has made clear that private rights of action may not be inferred without an indication of congressional intent.

"In the mid-20th century, ... the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose," and so, "as a routine matter with respect to statutes,

the Court would imply causes of action not explicit in the statutory text itself." *Abbasi*, 137 S. Ct. at 1855 (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)). But the Court has taken far "more restrictive views on private rights of action in recent decades." *Unite Here Local 355* v. *Mulhall*, 571 U.S. 83, 85 (2013) (Breyer, J., dissenting from dismissal of writ of certiorari as improvidently granted). "The high-water mark for implied causes of action came in the period before [this] Court's 1975 decision in *Cort* v. *Ash*"—but ever since then, the "Court has been very hostile to implied causes of action." *Johnson* v. *Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) (Kavanaugh, J.); *see Cort* v. *Ash*, 422 U.S. at 77–85.

This hostility flows from the premise that "'a decision to create a private right of action is one better left to legislative judgment in the great majority of cases'"—a point that this Court has "'recently and repeatedly'" emphasized in numerous "precedents [that] cast doubt on the authority of courts to extend or create private causes of action." *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004)). Indeed, "when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." *Abassi*, 137 S. Ct. at 1857. And because "[d]eciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law," "the right answer" as to who should do that "'most often will be Congress.'" *Jesner*, 138 S. Ct. at 1413 (Gorsuch, J., concurring in part and concurring in the judgment; quoting *Abassi*, 137 S. Ct. at 1857).

Accordingly, under the approach the Court has taken toward inferring rights of action for over four decades now, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286. "[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted, as [the Court's] recent decisions have made clear." *Transamerica*, 444 U.S. at 15–16. "Statutory intent on this latter point is determinative," for "[w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter." *Sandoval*, 532 U.S. at 286–87.

B. Congress gave no indication that it intended Section 14(e) to be privately enforced.

These principles apply with full force to the securities laws. And they fully pertain, in particular, to the Securities Exchange Act of 1934—despite this Court's recognition of private rights under Sections 14(a) and 10(b) of that Act during the "*ancien regime*" of permissive private-right creation that ended in 1975. *Sandoval*, 532 U.S. at 287. As the Court explained in *Sandoval*: "Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in [*J.I. Case* v.] *Borak*" (which created a private right under Section 14(a)) "have we applied *Borak*'s method for discerning and defining causes of action. Having sworn off the habit of venturing beyond Congress's intent, we will not accept [an] invitation to have one last drink." 532 U.S. at 287 (citations omitted).

And in fact, ever since the demise of the *ancien regime*, the Court has roundly and repeatedly rebuffed such requests under the federal securities laws.

Addressing Section 14(e) specifically, the Court refused to infer a private right of action for damages under that provision in favor of defeated tender offerors. *Piper*, 430 U.S. at 24–42.[2] Considering Section 206 of the Investment Advisers Act of 1940, the Court refused to infer a private right of action for damages in favor of victims of frauds and breaches of fiduciary duties by investment advisors. *Transamerica*, 444 U.S. at 19–24. And in cases the Court cited as examples in *Sandoval*, the Court rejected a private right for damages under Section 17(a) of the Exchange Act, *Touche Ross*, 442 U.S. at 568–79, as well as a private right for damages under Section 10(b) of the Exchange Act for aiding and abetting fraud, *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170–78 (1994); *see Sandoval*, 532 U.S. at 287.

No more of a basis exists to find a private right of action here. As in the earlier cases, the judicial "task is limited solely to determining whether Congress intended to create the private right of action," so "analysis must begin with the language of the statute itself." *Touche Ross*, 442 U.S. at 568. And as the Court specifically said about Section 14(e) in *Piper*, that provision, on its face, "makes no provision whatever for a private cause of action." 430 U.S. at 24. Section 14(e) merely contains a prohibition—a prohibition against, among other things, making "untrue statement[s] of ... material fact," "omit[ting] to state ... material fact[s] necessary in order to make ... statements made ... not misleading," and "engag[ing] in any fraudulent, deceptive, or manipulative acts or

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[2] The Court expressly "limited" its holding to whether such offerors could sue, and "intimate[d] no view" on "[w]hether shareholder-offerees ... have an implied cause of action under § 14(e)." *Id.* at 42 n.28.

practices," all "in connection with any tender offer or request or invitation for tenders." 15 U.S.C. § 78n(e). Section 14(e) "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." *Transamerica*, 444 U.S. at 19. In short, Section 14(e) "does not, by its terms, purport to create a private cause of action in favor of anyone," *Touche Ross*, 442 U.S. at 569—and so it does not.

Beyond this, the fact that Section 14(e) proscribes fraudulent conduct and thereby "protect[s] [a] class of shareholder-offerees," *Piper*, 430 U.S. at 38, provides no basis for judicially inferring a right of action that Congress did not expressly create. The statute at issue in *Transamerica*, for example, similarly prohibits fraudulent conduct: It "broadly proscribes fraudulent practices by investment advisers, making it unlawful for any investment adviser 'to employ any device, scheme, or artifice to defraud ... [or] to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.'" 444 U.S. at 16 (quoting 15 U.S.C. § 80b–6). And by proscribing that fraudulent conduct, Section 206 protects a class of investor-victims: As the Court explained, "Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited." *Id.* at 24.

None of that mattered in *Transamerica*. "[T]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf." *Id.* So, too, in *Touche Ross*, where the Court observed: "the mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf." 442 U.S. at 578. The bottom line in both of

these cases furnishes the bottom line here: "The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end." *Transamerica*, 444 U.S. at 24.

The inquiry could end here for Section 14(e) as well. But more can, and should, be said—about the context and the structure of the Securities Exchange Act, and of the securities statutes generally. Those laws are chock-full of prohibitions of various sorts against fraud and deception and manipulation and misstatements and omissions and failures to comply with a myriad of regulations, and they contain a potpourri of proscriptions promulgated to protect investors. And apart from the provisions that explicitly create private rights to sue, nothing in those laws gives any more or less of an indication of a congressional intent to authorize private suits than does Section 14(e). Indeed, in *Touche Ross*, the Court clearly understood that inferring a right of action there would have meant "that virtually *every* provision of the securities Acts gives rise to an implied private cause of action"—an untenable, absurd result that the Court, quite understandably, "decline[d]" to accept. 442 U.S. at 577 (emphasis added). That logic applies to Section 14(e) as well.

At the same time, the express rights that Congress did authorize show how judicial creation of a private right under Section 14(e) would frustrate, and not further, Congress's intent. Today there are "eight express liability provisions contained in the 1933 and 1934 Acts," as amended over the years: Sections 11, 12, and 15 of the Securities Act of 1933, and Sections 9, 16, 18, 20, and 20A of the Securities Exchange Act of 1934. *Musick, Peeler & Garrett* v. *Emp'rs Ins. of Wausau*, 508 U.S. 286, 296 (1993); *see* 15 U.S.C.

§§ 77k, 77*l*, 77*o*, 78i, 78p, 78r, 78t, 78t–1. Each of these express rights very precisely defines who may sue, whom they may sue, what they may sue for, and under what circumstances they may sue. As this Court has repeatedly recognized, each of these "carefully drawn express civil remedies" contains "carefully drawn procedural restrictions" that "Congress regarded ... as significant." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195, 210 & n.30 (1976); *see also Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 384 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 380 (1982); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

These statutory cognates of precision instruments show how, "'[o]bviously, ... when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly'"—indeed, exactingly. *Transamerica*, 444 U.S. at 21 (quoting *Touche Ross*, 442 U.S. at 572). Congress didn't do so at all in Section 14(e), or, for that matter, anywhere in the Williams Act,[3] the 1968 law that added Section 14(e) to the Exchange Act. "The fact that [Congress] enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability on a private suitor." *Transamerica*, 444 U.S. at 21. For "it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Id.* at 20 (quoting *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)). The "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it," controls. *Id.* at 19.

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[3] Pub. L. No. 90–439, 82 Stat. 454 (1968).

That is especially so here, given the "significant," "carefully drawn procedural restrictions" Congress placed in the "express civil remedies" it has so "carefully drawn." *Ernst & Ernst*, 425 U.S. at 195, 210 & n.30. The judicial creation, or even the judicial extension, of a private right could easily disturb a policy balance that Congress strove to create.

And here, the balance that Congress apparently chose in enacting the Williams Act in 1968 was to let the SEC, and not private plaintiffs, do the job. In none of its provisions—not just Section 14(e)—does the statute mention any private right to sue. Likewise, the history of the Williams Act's drafting and passage contains no suggestion that any members of Congress believed that the legislation they were enacting would create any right to sue. *See, e.g.*, H.R. REP. NO. 90–1711, at 7–14 (1968); S. REP. NO. 90–550, at 7–11 (1967); *Piper*, 430 U.S. at 26–34 & n.20. To the contrary, the Senate report on the Williams Act refers explicitly and exclusively to *public* enforcement: "the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer." S. REP. NO. 90–550, at 4. Both the House and Senate reports repeatedly mention the regulatory powers of the Commission, as well as the "sanctions" that agency may impose—but say *not one word* about private suits. H.R. REP. NO. 90–1711, at 3; S. REP. NO. 90–550, at 3. Plainly that is because Congress contemplated that *no* private suits could be brought under any provision of the Williams Act, including Section 14(e).

"Like substantive federal law itself, private rights of action to enforce federal law must be created by

Congress." *Sandoval*, 532 U.S. at 286. Congress created no private right under Section 14(e).

C. The Court should follow its private-right jurisprudence—and Congress's intent.

In opposing certiorari, respondents offered four reasons why this Court should, just this once, suspend its now nearly half-century-old private-right jurisprudence—and defy congressional intent—by recognizing a private right under Section 14(e) in this case. *See* Br. in Opp. 28–29. None is persuasive.

For starters, respondents contended that petitioners waived the no-private-right argument below. Br. in Opp. 28. Not so. Petitioners' claim below, as it remains here, is that respondents' complaint did not make out a basis for relief under Section 14(e). Before the panel below, which was bound by Ninth Circuit precedent recognizing a Section 14(e) private right, petitioners argued that respondents' complaint was deficient because it failed to plead scienter. Before the *en banc* court of appeals, which can, of course, overrule its own precedent, petitioners made that same argument, but *also* argued there was no private right at all. *See* Pet. Br. 43 n.12. And at the petition stage in this Court, petitioners, joined by the Chamber, again made both arguments in support of their claim.

Petitioners were entitled to do precisely that. The scienter-is-required and no-private-right contentions are, at most, "separate *arguments* in support of a single claim," *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992)—petitioners' claim that the complaint pleads no judicially-created right to damages under Section 14(e). "And '[o]nce a federal claim is properly presented, a party can make any argument in support

of that claim; parties are not limited to the precise arguments they made below." *Citizens United* v. *FEC*, 558 U.S. 310, 330–31 (2010) (quoting *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation and internal quotation marks omitted)). But the two arguments are not that separate in any event. The threshold issue of whether a private right of action exists *in any circumstance* is "fairly included," S. CT. R. 14(a), within the question presented—whether "Section 14(e) ... supports an inferred private right of action based on a negligent misstatement or omission," Pet. i—because that question can't be answered without answering the first. Even if it hadn't been raised below, the no-private-right issue would still be properly before this Court.

And the Court should not decide this case by simply assuming the existence of a private right of action in this case, and then pronouncing an element of a hypothesized private right. Even doing that would undermine the Court's jurisprudence on private rights. Not only would it allow, if not encourage, the lower courts to continue to recognize private rights in the absence of supporting congressional intent—but it would also place this Court in the paradoxical position of defining an element of a right of action that its case law today makes clear shouldn't exist (and no doubt will someday say doesn't exist). It would amount to sipping the "one last drink" the Court eschewed in *Sandoval*, 532 U.S. at 287.

A second argument made by respondents was that the lower "courts have repeatedly confirmed that 'a private right of action may be inferred from Section 14(e).'" Br. in Opp. 29 (quoting *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 n.20 (5th Cir. 1974)). But the fact that lower courts have ignored this

Court's precedents for so long should not deter the Court from applying them here. In *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010), for example, the Court addressed a "disregard of the presumption against extraterritoriality" that "ha[d] been repeated over many decades by various Courts of Appeals in determining the application of the Exchange Act." The Court did not hesitate to correct that error, and in doing so, abrogated "the general approach that had been the law in the Second Circuit, and most of the rest of the country," for almost forty years—thus overturning, in just the Second Circuit alone, "dozens of cases" that had "refined [a] test over several decades." *Id.* at 274, 278 (Stevens, J., concurring in the judgment).

Even though the law applied in the lower courts changed substantially as a result, the Court's application of its precedents to correct that persistent lower-court error actually promoted stability and coherence in the law. Not only was the misapplication of Section 10(b) ended, but such a prominent abrogation of a substantial body of erroneous case law also had the secondary, yet salutary, effect of emphasizing the importance of the applicable legal principle—the presumption against extraterritoriality—in interpreting all federal statutes. The Court's decision also gave assurance that exceptions to its precedents will not be created through oversights or accidents of history in the lower courts. The fact that error below may be widespread and persistent counsels for correcting it—not countenancing it.

A third contention respondents trotted out at the petition stage was, quite remarkably, that "Section 14(e) contains exactly the same 'hints' that have supported [other] private rights under related securities laws for

decades"—namely, Section 14(a) and Section 10(b) of the Exchange Act. Br. in Opp. 28–29. But of course the Court's recognition of those implied rights took place during the *ancien regime* of free-spirited judicial private-right creation. Indeed, for Section 14(a), respondents actually rely on the Court's 1964 decision in *Borak*. Br. in Opp. 29. So enough said there. *See Sandoval*, 532 U.S. at 287 (condemning *Borak*). As for Section 10(b) and Rule 10b–5, this Court, in a one-sentence footnote in 1971, "simply explicitly acquiesced in [a] 25-year-old acceptance by the lower federal courts of an implied action under § 10(b)." *Touche Ross*, 442 U.S. at 577–78 n.19; *see Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971); *Kardon* v. *Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (first judicial decision inferring a 10(b)/10b–5 private right). But again, that acquiescence took place when *Borak*'s approach to judicial private-right creation remained the law.

In contrast, this Court has never recognized, or acquiesced in, any private right under Section 14(e).[4] To the contrary, in casting *Borak* aside, the Court "swor[e] off the habit of venturing beyond Congress's intent," *Sandoval*, 532 U.S. at 287, and swiftly made

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[4] *See Piper*, 430 U.S. at 24–42. Respondents assert that *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1 (1985), constitutes an "implicit recognition that Section 14(e) provides a private right of action." Br. in Opp. 29 n.18. Not true. Although the petitioner there was a private plaintiff, the Court nowhere mentioned the private-right issue, nowhere engaged in a private-rights analysis, and nowhere discussed its then-recent private-rights precedents, like *Cort*, *Touche Ross*, and *Transamerica*. The sole question the Court addressed and resolved was "whether misrepresentation or nondisclosure is a necessary element of a violation of § 14(e)," 472 U.S. at 2—a question pertinent to *any* Section 14(e) case, public or private.

clear that judges should not infer any more private rights of action under the federal securities laws, *see, e.g.*, *Touche Ross*, 442 U.S. at 568–79; *Transamerica*, 444 U.S. at 19–24; see pp. 5–10, above.

And even rights of action created by this Court under the *ancien regime*—like the Section 10(b) right—find themselves cabined by the Court's current approach: "Concerns with the judicial creation of a private cause of action caution against its expansion. ... *Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.*" *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (emphasis added). Artifacts of a bygone era, the existing private rights under Sections 10(b) and 14(a) stand frozen in place, fixed by *stare decisis* and this Court's private-right jurisprudence. Again, in stark contrast, *no* decision of *this* Court has ever recognized a private right under Section 14(e)—while, on the other hand, the Court's extensive, still-applicable body of private-rights precedents firmly establishes that judges may *not* create one. Sections 10(b) and 14(a) thus provide no basis for creating a private right under Section 14(e).

A fourth and final argument that respondents advanced for avoiding the Court's private-rights jurisprudence is that Congress has somehow acquiesced in the lower courts' decisions recognizing a Section 14(e) private right. Invoking the Private Securities Litigation Reform Act of 1995 (the PSLRA) and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), respondents assert that "Congress has repeatedly revamped core features of securities litigation" without overturning those lower-court decisions—and that, accordingly, Congress must have thought those decisions correct. Br. in Opp. 29.

That argument lacks all merit. Time and again, this Court has emphasized that "congressional inaction ... 'deserve[s] little weight in the interpretive process.'" *Sandoval*, 532 U.S. at 292 (quoting *Cent. Bank*, 511 U.S. at 187). "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation." *Cent. Bank*, 511 U.S. at 186 (citation and internal quotation marks omitted). But even apart from that commonplace canon, respondents' argument fails in light of what the PSLRA and SLUSA actually say and do. Far from ratifying any private right, the PSLRA *disclaims* doing so: Section 203 provides that *"[n]othing in this Act or the amendments made by this Act shall be deemed to create or ratify any implied private right of action ...."* Pub. L. No. 104–67, § 203, 109 Stat. 737, 762 (1995) (15 U.S.C. § 78j–1 note) (emphasis added). In other words, "Congress passed a law to tell us *not* to draw any inference from its inaction." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 300 (2014) (*"Halliburton II"*) (Thomas, J., concurring in the judgment).

And SLUSA hardly "revamped core features of securities litigation." Br. in Opp. 29. The statute narrowly addresses securities class actions brought under *state* law, or in *state* court; it "prohibits certain securities class actions based on *state* law," and "provides for the *removal* of certain [securities] class actions to federal court" from *state* court. *Cyan, Inc.* v. *Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1067 (2018) (emphasis added). Quite obviously, this procedural law's silence about Section 14(e) can't be taken as tacit approval of a substantive private right, and instead reflects how interpreting Section 14(e) had naught to do with Congress's aim of "enact[ing]

national standards for securities class action lawsuits involving nationally traded securities." Pub. L. No. 105–353, § 2, 112 Stat. 3227, 3227 (1998) (15 U.S.C. § 78a note).

In short, respondents have presented no basis for avoiding the clear authority that requires rejection of a private right under Section 14(e).

II. THE COSTS OF RECOGNIZING A SECTION 14(e) PRIVATE RIGHT VASTLY OUTWEIGH THE BENEFITS.

Apart from the fact that there is no statutory basis for a private right under Section 14(e), the costs of recognizing such a right significantly outweigh the benefits. In particular, an examination of Section 14(e) litigation over the past twenty-three years shows that the Section 14(e) private right has become little more than a costly vehicle for plaintiffs' attorneys to extract fees from corporate acquisitions involving tender offers. And refusing to recognize a Section 14(e) private right would avoid the burdens on the federal courts—especially this Court—of defining the elements of that private right without guidance from Congress.

A. Section 14(e) has become a vehicle for lawyer-driven litigation designed to extract attorneys' fees from corporate-control transactions involving tender offers.

In assessing the value of the Section 14(e) private right, it helps to see the uses to which plaintiffs and their counsel have put that right in recent years. And to see those uses, no better resource may be found than Stanford Law School's Securities Class Action Clearinghouse. That website consists of a searchable

public database that has collected information about securities class actions filed since January 1, 1996, ten days after the PSLRA became law.[5]

A review of the cases in the database shows that in recent years, the overwhelming majority of Section 14(e) class actions consist of cases that purport to seek injunctive relief against tender offers, but that are then promptly discontinued voluntarily—with no significant litigation activity. Sometimes a motion for a temporary restraining order or preliminary injunction is filed, but usually not; and when one is

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[5] The database's advanced search page may be found at http://securities.stanford.edu/advanced-search.html. There is a field for "Claims" in the middle of the page, and by selecting "1934 act claims – section 14e," and by clicking "Search" at the bottom, the user can obtain a list of every Section 14(e) class-action case in the database since 1996, along with links to pages containing docket information and links to complaints in those cases. The list can then be formatted in tabular form by clicking on the "Show in Filings Table" link toward the upper right.

Using the list generated by that search, counsel for *amici* collected and examined docket sheets for all, and complaints for nearly all, of the cases retrieved, which numbered 160 on the morning this brief was filed. This likely *understates* the number of cases filed, as multiple cases with similar allegations are often contemporaneously filed against similar sets of defendants; when that happens, database administrators count the similar cases as one—even "before the courts consolidate those lawsuits into a single proceeding." Stanford Law School Securities Class Action Clearinghouse, Methodology, Definition of a Single Filing or Record in the SCAC Database, http://securities.stanford.edu/about-the-scac.html#methodology.

The complaints reviewed by counsel are posted at http://bit.ly/14eCmplts; the dockets, at http://bit.ly/14eDckts. Counsel was unable to obtain complaints in three cases filed before 2000, but this made no difference to the discussion here, as docket sheets and court decisions made clear that "significant activity" (defined below, see p. 21 & n.7) had occurred in each.

filed, almost invariably it is quickly withdrawn, before any response is submitted.

The appendix to this brief contains a table prepared by *amici*'s counsel to illustrate the phenomenon. The table shows that, of the 155 Section 14(e) cases that could be categorized,[6] some ***116*** were injunctive-relief cases in which no "significant activity"[7] occurred. The table also shows how this kind of litigation is now being filed at an accelerating rate, and now constitutes around 90 percent or more of Section 14(e) litigation filed these days. Specifically, of the 116 no-significant-activity injunctive-relief Section 14(e) cases filed since 1996, some ***84*** were filed since the beginning of 2016—in just the last *three* years. (The overwhelming majority of these cases were brought by just five law firms.[8]) In contrast, only ***nine*** Section 14(e) cases since 2016 could be categorized as not fitting that description. Given the fact that multiple filings may have occurred

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[6] Of the 160 cases retrieved, two were erroneously classified in the database, and did not in fact involve Section 14(e) claims, leaving 158 actual Section 14(e) cases. Of those 158, three are too new to be categorized.

[7] The fourth column of the table categorizes each case as to whether it was an "Injunctive Relief Case Dismissed Without Significant Activity?" For this purpose, "significant activity" means that the defendants answered the complaint, or that the plaintiffs responded to a motion to dismiss, or that the court decided a motion for a preliminary injunction—a fairly lenient standard. Also excluded from the no-significant-activity category was a case in which the court found that shareholders had received an actual financial benefit from a settlement. See Appendix, p. 1a, 8a & nn.*, †.

[8] The firms were Rigrodsky & Long, P.A. (33 cases), WeissLaw LLP (17), Monteverde & Associates PC (14), Levi & Korsinsky, LLP (14), and Faruqi & Faruqi LLP (11). Only eight of the 84 cases did not involve these firms; thirteen involved two of them.

in many of these cases, see p. 20, n.5, above—and probably did, including in multiple jurisdictions—these totals are very likely *understated*.

What gives with this trend toward no-significant-litigation Section 14(e) litigation? It's part of a much larger phenomenon in recent years in corporate litigation—the growth in frivolous and abusive lawsuits attending the announcement of mergers and acquisitions. As the U.S. Chamber of Commerce's Institute for Legal Reform explained in 2012, before courts began taking steps to curb these suits:

> Here's how it works: Just about every merger or acquisition that involves a public company and is valued over $100 million—91% of all such transactions in 2010 and 2011—becomes the subject of multiple lawsuits within weeks of its announcement. Because the parties to the merger want to close their deal and begin to reap the economic benefits of the combination, the vast majority of these lawsuits settle quickly—within three months—and typically provide little or no benefit for shareholders. But the settlements do award large attorneys' fees to the lawyers who filed the lawsuits.

U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, THE TRIAL LAWYERS' NEW MERGER TAX 1 (2012) ("Merger Tax"), *available at* http://bit.ly/2qAaVUZ.

These sorts of settlements became known as "disclosure settlements." As the Chancellor of Delaware later explained, the "'disclosure settlement'" became "the most common method for quickly resolving stockholder lawsuits that are filed routinely in response to the announcement of virtually every transaction involving

the acquisition of a public corporation." *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 887 (Del. Ch. 2016). "In such lawsuits, plaintiffs' leverage is the threat of an injunction to prevent a transaction from closing." *Id.* at 892. And "the most common currency used to procure a settlement is the issuance of supplemental disclosures to the target[] [company's] stockholders before they are asked to vote on the proposed transaction," the idea being that "stockholders will be better informed." *Id.*

But the problem was that, in too many cases, "the additional information is not material, and indeed may be of only minor value." *Id.* at 892–93. As a result, explained the Chancellor,

> far too often such [disclosure-settlement] litigation serves no useful purpose for stockholders. Instead, it serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent.

Id. at 891–92.

Disclosure-settlement litigation became a growth industry over the past decade and a half. The number of such cases "quadrupled from 2005 to 2010." MERGER TAX, at 3 (emphasis omitted); *accord* Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 371 (2011). By 2010, 90 percent of mergers-and-acquisitions transactions faced this sort of litigation. CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2017 M&A LITIGATION 2 (2018)

("CORNERSTONE 2017 M&A LITIGATION REVIEW"), available at https://stanford.io/2QvQHa4.

And by the middle of this decade, Delaware's corporate-law court, the Court of Chancery, began expressing concern about disclosure settlements. *See, e.g.*, *In re Riverbed Tech., Inc. Stockholders Litig.*, No. 10484–VCG, 2015 WL 5458041, at *3–*6, (Del. Ch. Sept. 17, 2015) (approving settlement, but finding it "troubling"); *Acevedo* v. *Aeroflex Holding Corp.*, No. 9730–VCL, 2015 WL 4127547 (Del. Ch. July 8, 2015) (order rejecting settlement). In its *Trulia* decision in 2016, that court ultimately said enough was enough: No longer would it rubber-stamp disclosure settlements, given "the mounting evidence that supplemental disclosures rarely yield genuine benefits for stockholders." *Trulia*, 129 A.3d at 896. The Chancellor declared that the court would henceforth be "increasingly vigilant" in scrutinizing such settlements, and would "guard against potential abuses in [attorneys'] fee demands for mooted representative actions." *Id.* at 887, 898. Other courts—including the Seventh Circuit in addressing a settlement of state-law claims—have since followed *Trulia*. *See, e.g.*, *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016) (Posner, J.).

The Delaware Court of Chancery's crackdown on disclosure settlements prompted two strategic responses from the plaintiffs' bar—both of which are reflected in the Stanford search results. The first was to bring more claims in federal courts. Historically, the deal-disclosure cases mostly involved state breach-of-fiduciary duty claims, mostly in state courts—frequently claims under Delaware law brought in the Court of Chancery. *See, e.g.*, Matthew D. Cain, *et al.*, *The Shifting Tides of Merger Litigation*, 71 VAND. L.

REV. 603, 611, 621 (2018). But federal claims had also been part of the game. *See, e.g., id.* at 621. When transactions involve mergers requiring shareholder votes, and thus involve the solicitation of proxies, federal claims have been brought under Section 14(a). *See id.* at 611. And when the transactions involve tender offers, the claims have involved Section 14(e)—as the Stanford database search shows.

But after *Trulia* came down in 2016, plaintiffs' lawyers significantly increased their filings in federal court. By 2017, "the number of M&A deals litigated in federal court increased 20 percent, while state court filings declined." CORNERSTONE 2017 M&A LITIGATION REVIEW, at 4. Also by 2017, "74% of M&A deals over $100 million triggered federal securities suits, a 500% increase from 2009." U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, A RISING THREAT: THE NEW CLASS ACTION RACKET THAT HARMS INVESTORS AND THE ECONOMY 7 (2018) ("RISING THREAT"), *available at* http://bit.ly/ 2FlslPf. And again by 2017, 44 percent of all merger-related disclosure litigation was settled in federal courts. Cain, 71 VAND. L. REV. at 627. The massive upsurge in Section 14(e) litigation after 2015 reflected in the appendix to this brief also illustrates the trend.

Delaware's efforts to curb disclosure settlements had another effect that manifests itself in the Stanford search results—an increase in voluntary dismissals. There had always been voluntary dismissals in deal litigation, simply because of the fact that plaintiffs typically file multiple cases in multiple courts for each deal. "[N]o settlement will likely be approved unless all of the attorneys involved agree to it," and that "add[s] to the leverage that plaintiffs' attorneys"—in each of the suits—"have in forcing a quick settlement

in merger objection suits." Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L. J. 55, 80 (2014). Usually "[d]efendants prefer a global settlement" in a single forum that releases all claims, state and federal, relating to a transaction, and that requires that all plaintiffs' lawyers in all the cases must be "satisfied with the fee award." *Id* at 80 n.188. As part of the global settlement, the parties agree to have all parallel cases in all courts dismissed. Hence the voluntary, stipulated dismissals.

But as the appendix to this brief shows, such dismissals have skyrocketed lately—again, a byproduct of *Trulia*. As the Chamber has explained, in addition to their "federal court gambit," plaintiffs' lawyers "have been able to replicate their pre-*Trulia* practice of quick resolutions accompanied by payments of attorneys' fees." RISING THREAT, at 11. But now "the mechanism is slightly different." *Id.* Instead of offering settlements, plaintiffs' lawyers have been leveraging the nuisance value of weak federal claims into demands that defendants "unilaterally add new disclosures to address the supposed 'deficiencies' alleged in the class action complaint—which moots the claim—and pay a 'mootness fee' to the plaintiffs' lawyers in return for dismissal of the case." *Id.* "Typically, the payments are made without court approval." *Id.* at 12. And that's key for the plaintiffs' lawyers: "it avoids the risk that federal courts might follow Delaware's lead and reject both disclosure-only settlements and the associated fee awards," *id.*—as, in fact, the Seventh Circuit did in *Walgreen*, 832 F.3d at 725. Consistent with the Stanford Section 14(e) database search results, one scholarly article found that, in 2017, 89 percent of all deal cases were dismissed; 75 percent involved pay-

ment of mootness fees; and 100 percent of all mootness attorneys' fees were paid in federal courts. Cain, 71 VAND. L. REV. at 623, 627. The average mootness fee in 2017 was $265,000. *Id.* at 625.

What all this shows is that Section 14(e) has become, for the most part, a vehicle used not for making whole shareholders who are victims of fraud in tender offers, but a means by which plaintiffs' lawyers can secure a place at the bargaining table in extracting attorneys' fees in a farcical genre of "litigation" that benefits no one but themselves. Section 14(e) litigation mostly now amounts to a "'litigation tax'" on acquisitions involving tender offers—an "additional cost [that] may transform what would have been an economically sensible pro-consumer deal into a non-starter—depriving shareholders, workers, and the economy as a whole of the benefits that the deal would have produced." MERGER TAX, at 2. As "[f]or deals that go forward, the 'tax' diverts ... millions of dollars away from shareholders and workers and into the pockets of trial lawyers." *Id.*

The Court can take a significant step toward eliminating the economic burdens of such frivolous litigation simply by applying its private-rights jurisprudence to Section 14(e). And doing so would not deprive investors of the ability to bring *real* damages claims involving tender-offer fraud. That is because there will still be Section 10(b) and Rule 10b–5. Until the decision below came up with a negligence standard under Section 14(e), the courts inferring a Section 14(e) private right had held the elements of a claim "are essentially the same under § 14(e) as under Rule 10b–5," "except that § 14(e) applies to tender offers rather than the purchase or sale of securities." *Gulf & W. Indus., Inc.* v. *Great Atl. & Pac. Tea Co.*, 476 F.2d

687, 696 (2d Cir. 1973). Because a sale of shares into a tender offer plainly constitutes a sale and purchase of securities under Section 10(b), the private right of action under Section 10(b) and Rule 10b–5 provides a full damages remedy for claims of fraud by tendering shareholder-offerees.[9]

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[9] Some courts have suggested that *non*tendering shareholders may sue under Section 14(e) if they were deceived into holding their shares and *not* tendering. *See, e.g.*, *Stull* v. *Bayard*, 561 F.2d 429, 432 (2d Cir. 1977). But such claims ought to be barred by this Court's reasoning in *Blue Chip Stamps*, 421 U.S. at 731–55, which held that only actual purchasers and sellers could sue under Section 10(b). That holding is based not on statutory text, but rather on a concern that should equally apply to a Section 14(e) private right—that "vexatious litigation" would ensue if plaintiffs could assert fraud after they had "decided not to purchase or sell stock"—a claim not "capable of documentary verification." *Id.* at 740, 746.

In any event, claims by nontendering shareholders under Section 14(e) appear to be rare. As illustrated by a hypothetical in the Chamber's petition-stage *amicus* brief, such shareholders would not likely have damages. *See* U.S. Chamber Pet.-Stage Br. 14–15 n.2. The Stanford database search turned up only three such cases. Two were dismissed. *See Hohenstein* v. *Behringer Harvard REIT I, Inc.*, No. 3:12–cv–3772–G, 2014 WL 1265949, at *8–*9 (N.D. Tex. Mar. 27, 2014) (failure to plead scienter, material omission, and loss causation); *In re Piedmont Office Tr. Inc. Sec. Litig.*, No. 1:07–cv–2660–CAP, 2012 WL 12951737, at *4–*5 (N.D. Ga. Aug. 27, 2012) (failure to plead scienter). A third partially survived dismissal, but it appears that the Section 14(e) claim in that case has taken a backseat to a Section 10(b) claim by open-market *purchasers* who assert that corporate management inflated stock prices to keep shareholders from tendering into a hostile third-party offer. *See Roofer's Pension Fund* v. *Papa*, Civ. No. 2:16–cv–02805–MCA–LDW, 2018 WL 3601229, at *6–*24 (D.N.J. July 27, 2018); Am. Compl., *Roofers' Pension Fund* v. *Perrigo Co., PLC*, No. 2:16–cv–02085–MCA–LDW (D.N.J. June 21, 2017) (ECF No. 89), ¶¶ 273(a), 282–90. The hypothetical in the Chamber's petition-stage brief explains why such purchasers

In short, as recognized and utilized in the lower courts today, the Section 14(e) right of action does far more harm than good, harm that can be eliminated by a straightforward application of this Court's private-rights precedents.

B. Inferring a private right under Section 14(e) would burden courts with the impossible task of divining congressional intent as to elements of a right of action Congress did not intend to create.

There is still one additional cost to recognizing a private right under Section 14(e). And that is the substantial burden it would impose upon the federal courts, especially this one, in having to define its elements. As the tortuous, decades-long history of defining the private right under Section 10(b) and Rule 10b–5 makes clear, the judicial manufacture of a private right under the securities laws brings with it the need to answer a seemingly endless array of "questions about the elements of the [inferred] liability scheme"—questions that "ha[ve] posed difficulty," of course, "because Congress did not create [the inferred] cause of action and had no occasion to provide guidance about [its] elements." *Cent. Bank*, 511 U.S. at 172–73.

As one commentator put it in 2014, "the complexity of that task is reflected, in part, by the fact that there are at least twenty-eight Supreme Court opinions interpreting the scope of the section 10(b) right of action. Defining the elements of this cause of action and continuing to manage its evolution have consumed a non-trivial proportion of the Supreme Court's

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may have damages (and Section 10(b) claims) while the nontendering shareholders would not.

energy." Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 324–26 & n.85 (2014) (citing cases). Since that article was published, the Court has rendered one more decision interpreting the Section 10(b) private right,[10] making the total twenty-nine. Section 14(e) could likewise pose interpretive difficulties, of course, as it offers no more guidance about the elements of a private right than does Section 10(b). So, too, with any judicially created private right: It is inherently an "awkward task" to determine the standards "Congress intended courts to apply to a cause of action it really never knew existed." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 359 (1991).

No better illustration of the awkwardness of this task can be found than *this* case. In defining the scope of the private right it discovered, the Ninth Circuit hoisted high the banner of textualism: A Section 14(e) claim requires pleading and proof merely of negligence, the court below held, because Section 14(e) contains two main clauses, separated by the disjunctive "or"; and the "first clause"—"'to make any untrue statement of a material fact or omit to state any material fact'"—"is devoid of any suggestion that scienter is required." Pet. App. 8a, 16a; *accord* Br. in Opp. 15–16. So negligence, the court concluded, is what the text commands.

But that *can't* be what the text commands—*no matter how* Section 14(e) is parsed. The phrase "to make any untrue statement of a material fact or omit to state any material fact" no more connotes negligence than it does scienter. *Not a word* in that clause refers to, or even implicates, *any* state of mind. In fact,

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[10] *Halliburton II*, 573 U.S. 258.

the parties agree—the clause "'does not expressly require ... *any* specific state of mind.'" Pet. Reply 9 (quoting Br. in Opp. 15).

Yet not even the Ninth Circuit could fathom turning Section 14(e) into a strict-liability private right of action. And so—without *any* explanation of how a negligence standard could be grounded in the statutory text—the court below simply engrafted one onto Section 14(e) for purposes of the judicially-created private right of action. *See* Pet. App. 2a, 15a, 16a. The closest that court came to articulating a rationale for doing so was to say that Section 17(a)(2) of the 1933 Act "is largely identical to the first clause of Section 14(e)"—and that under *Aaron* v. *SEC*, 446 U.S. 680 (1980), Section 17(a)(2) "requires a showing of negligence." Pet. App. 13a. But this Court in *Aaron* held *no such thing*. *Aaron* did not involve an inferred private right of action. And although it held that scienter was not required, it did *not* say that negligence was the standard under Section 17(a)(2), and did not even use the word "negligence" or any of its cognates in the relevant discussion. 446 U.S. at 696. Simply put, there was no basis whatsoever for the Ninth Circuit to declare negligence, rather than scienter, the state-of-mind standard for purposes of an inferred private right under Section 14(e).

Which brings us back to the ultimate problem—and cost—in recognizing a private right of action here. While professing to discern the intent of Congress by carefully examining statutory text, the court below simply made up a state-of-mind standard for its made-up private right of action. But in a sense, the Ninth Circuit may be forgiven; it simply *had* to make it up. For having long ago manufactured a Section 14(e) private right, the court below had committed itself to

a paradoxical, nonsensical, and unavailing task—that of discerning what state-of-mind requirement Congress intended for a private right Congress never intended to exist—and therefore never addressed.

All this shows the wisdom of the course this Court took long ago, when it abandoned the fraught enterprise of creating rights of action not grounded in statutory text and Congress's will—and ever since, each time the Court has steadfastly refused an invitation to get back in the game. The invitation presented here, decades too late, the Court should decline once again.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

SECTION 14(e) CASES FROM STANFORD CLASS ACTION CLEARINGHOUSE DATABASE SEARCH (As of February 26, 2019)

	Filing Name/ Issuer	Filing Date	District Court	Injunctive Relief Case Dismissed Without Significant Activity?*	Notes
160	Loxo Oncology, Inc.	01/24/2019	D.Del.	Yes	Voluntarily dismissed.
159	TESARO, Inc.	01/04/2019	D.Del.	?	Too early to say. Ongoing.
158	iPass, Inc.	12/12/2018	N.D.Cal.	Yes	Voluntarily dismissed.
157	Intersections Inc.	12/11/2018	D.Del.	Yes	Voluntarily dismissed.
156	ConvergeOne Holdings, Inc.	12/03/2018	D.Del.	?	Too early to say. Ongoing.
155	Black Box Corp.	11/29/2018	D.Del.	?	Too early to say. Ongoing.
154	Datawatch Corp.	11/20/2018	D.Del.	Yes	Voluntarily dismissed.
153	JetPay Corp.	11/13/2018	D.Del.	Yes	Voluntarily dismissed.
152	Nevsun Res. Ltd.	11/09/2018	S.D.N.Y.	Yes	Voluntarily dismissed.
151	Corium Int'l, Inc.	10/29/2018	N.D.Cal.	Yes	Voluntarily dismissed.
150	CafePress Inc.	10/17/2018	D.Del.	Yes	Voluntarily dismissed.
149	Senomyx, Inc.	10/08/2018	D.Del.	Yes	Voluntarily dismissed.
148	Essendant Inc.	09/27/2018	D.Del.	Yes	Voluntarily dismissed.
147	Invuity, Inc.	09/26/2018	N.D.Cal.	Yes	Voluntarily dismissed.
146	Reis, Inc.	09/25/2018	S.D.N.Y.	Yes	Voluntarily dismissed.
145	Jamba, Inc.	08/23/2018	D.Del.	Yes	Voluntarily dismissed.
144	Xplore Tech. Corp.	07/27/2018	D.Del.	Yes	Voluntarily dismissed.
143	AbbVie Inc.	07/26/2018	N.D.Ill.	No	Damages claim by class of persons who transacted in AbbVie stock; parallel 10(b)/10b–5 claim. Ongoing.
142	Juniper Pharm., Inc.	07/26/2018	D.Mass.	Yes	Voluntarily dismissed.

* For purposes of this table, "significant activity" means, at the very least, the defendants' filing of an answer to a complaint, a plaintiffs' filing of an opposition to a motion to dismiss, a court's decision on a motion for a preliminary injunction, or, if none of these happened, a finding by the court (on a motion for attorneys' fees) that the litigation resulted in an improvement in the financial terms of a tender offer (see p. 8a & n.†, below).

141	Diamond Resorts Int'l, Inc.	07/23/2018	D.Nev.	No	Damages claim by class of tendering shareholders; parallel 10(b)/10b–5 claim. Ongoing.
140	Foundation Medicine, Inc.	07/10/2018	D.Mass.	Yes	Voluntarily dismissed.
139	RPX Corp.	06/04/2018	D.Del.	Yes	Voluntarily dismissed.
138	MTGE Inv. Corp.	05/25/2018	D.Md.	Yes	Voluntarily dismissed.
137	ARMO BioSciences, Inc.	05/24/2018	N.D.Cal.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
136	Mattersight Corp.	05/16/2018	D.Del.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
135	MuleSoft, Inc.	04/05/2018	N.D.Cal.	Yes	Voluntarily dismissed.
134	CSRA, Inc.	03/06/2018	D.Nev.	Yes	Voluntarily dismissed.
133	Crystal Rock Holdings, Inc.	03/05/2018	D.Conn.	Yes	Voluntarily dismissed.
132	Bioverativ Inc.	02/15/2018	D.Mass.	Yes	Voluntarily dismissed.
131	Key Tech. Inc.	02/15/2018	E.D. Wash.	Yes	Voluntarily dismissed.
130	Cascadian Therapeutics, Inc.	02/13/2018	D.Del.	Yes	Voluntarily dismissed; motion for mootness attorneys' fee terminated upon dismissal.
129	Juno Therapeutics, Inc.	02/13/2018	W.D.Wash.	Yes	Voluntarily dismissed.
128	Sucampo Pharma., Inc.	01/18/2018	D.Md.	Yes	Voluntarily dismissed after motion for TRO and preliminary injunction withdrawn.
127	Ignyta, Inc.	01/12/2018	S.D.Cal.	Yes	Voluntarily dismissed.
126	Amplify Snack Brands, Inc.	01/05/2018	W.D.Tex.	Yes	Voluntarily dismissed.
125	Repros Therapeutics Inc.	12/29/2017	S.D.Tex.	Yes	Voluntarily dismissed.
124	Time Inc.	12/18/2017	S.D.N.Y.	Yes	Voluntarily dismissed.
123	MGC Diagnostics Corp.	12/12/2017	D.Minn.	Yes	Voluntarily dismissed.
122	Inventure Foods Inc.	11/20/2017	D.Ariz.	Yes	Dismissed for failure to effect service of process on defendants within 90 days.
121	Planet Payment, Inc.	11/20/2017	E.D.N.Y.	Yes	Voluntarily dismissed.
120	Ocera Therapeutics, Inc.	11/17/2017	N.D.Cal.	Yes	Voluntarily dismissed. Motion for mootness attorneys' fee made after dismissal, but then withdrawn.
119	Onvia, Inc.	10/27/2017	W.D.Wash.	Yes	Voluntarily dismissed.

118	Exa Corp.	10/17/2017	D.Mass.	Yes	Voluntarily dismissed.
117	Dimension Therapeutics, Inc.	10/11/2017	D.Mass.	Yes	Voluntarily dismissed.
116	Landauer, Inc.	09/25/2017	D.Del.	Yes	Voluntarily dismissed.
115	MaxPoint Interactive, Inc.	09/14/2017	E.D.N.C.	Yes	Voluntarily dismissed.
114	Kite Pharma, Inc.	09/07/2017	C.D.Cal.	Yes	Voluntarily dismissed.
113	Supreme Indus., Inc.	08/29/2017	D.Del.	Yes	Voluntarily dismissed.
112	ShoreTel, Inc.	08/21/2017	N.D.Cal.	Yes	Voluntarily dismissed.
111	CDI Corp.	08/17/2017	E.D.Pa.	Yes	Voluntarily dismissed.
110	Guidance Software, Inc.	08/14/2017	C.D.Cal.	Yes	Voluntarily dismissed.
109	WebMD Health Corp.	08/09/2017	S.D.N.Y.	Yes	Voluntarily dismissed.
108	Rocket Fuel Inc.	08/04/2017	N.D.Cal.	Yes	Voluntarily dismissed.
107	MRV Commc'ns, Inc.	07/24/2017	C.D.Cal.	Yes	Voluntarily dismissed.
106	Spectranetics Corp.	07/21/2017	D.Colo.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
105	NCI, Inc.	07/19/2017	E.D.Va.	Yes	Voluntarily dismissed.
104	EnerNOC, Inc.	07/14/2017	D.Mass.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
103	Rightside Grp., Ltd.	06/30/2017	W.D.Wash.	Yes	Voluntarily dismissed.
102	Pershing Square Mgmt., L.P. (Allergan, Inc.)	06/28/2017	C.D.Cal.	No	Section 14(e)/Rule 14e–3 insider-trading damages claim on behalf of traders of options in and derivatives of Allergan stock; settled.
101	Patheon N.V.	06/19/2017	S.D.N.Y.	Yes	Voluntarily dismissed and preliminary injunction motion withdrawn.
100	CardConnect Corp.	06/13/2017	E.D.Pa.	Yes	Voluntarily dismissed.
99	Kate Spade & Co.	05/31/2017	S.D.N.Y.	Yes	Voluntarily dismissed.
98	Span-Am. Med. Sys., Inc.	05/25/2017	D.S.C.	Yes	Voluntarily dismissed after motion for TRO withdrawn.
97	Tangoe, Inc.	05/18/2017	D.Conn.	No	Damages claim on behalf of tendering shareholders; dismissed for failure to plead misstatement/omission, scienter, and loss causation.
96	Jive Software, Inc.	05/16/2017	N.D.Cal.	Yes	Voluntarily dismissed.
95	AdvancePierre Food Holdings, Inc.	05/12/2017	S.D.Ohio	Yes	Voluntarily dismissed.

94	RetailMeNot, Inc.	04/26/2017	D.Del.	Yes	Voluntarily dismissed.
93	Exar Corp.	04/18/2017	N.D.Cal.	Yes	Voluntarily dismissed. Parties' later agreement on mootness attorneys' fee noted on docket.
92	Air Methods Corp.	04/03/2017	D.Colo.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn. Parties' later agreement on mootness attorneys' fee noted on docket.
91	Nimble Storage, Inc.	03/21/2017	N.D.Cal.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
90	GigPeak, Inc.	03/08/2017	D.Del.	Yes	Voluntarily dismissed. Parties later stipulated to mootness attorneys' fee on the docket.
89	Popeyes La. Kitchen, Inc.	03/06/2017	D.Minn.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
88	Fresh Market, Inc.	03/02/2017	M.D.N.C.	No	Damages claim on behalf of tendering shareholders; voluntarily dismissed after filing of opening papers on motion to dismiss.
87	Cynosure, Inc.	03/01/2017	D.Del.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
86	Surgical Care Affiliates, Inc.	02/28/2017	D.Del.	Yes	Voluntarily dismissed.
85	Arctic Cat Inc.	02/08/2017	D.Minn.	Yes	Voluntarily dismissed.
84	CoLucid Pharma., Inc.	02/03/2017	D.Mass.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
83	Dermira Scis., Inc.	01/30/2017	D.N.J.	Yes	Voluntarily dismissed.
82	Ariad Pharma., Inc.	01/28/2017	D.Mass.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
81	Applied Micro Circuits Corp.	12/29/2016	N.D.Cal.	Yes	Voluntarily dismissed after motion for TRO and preliminary injunction withdrawn.
80	TubeMogul, Inc.	12/06/2016	N.D.Cal.	Yes	Voluntarily dismissed.
79	Monster Worldwide Inc.	09/09/2016	D.Mass.	Yes	Voluntarily dismissed.
78	Medivation, Inc	09/07/2016	N.D.Cal.	Yes	Voluntarily dismissed.
77	NetSuite, Inc.	08/30/2016	N.D.Cal.	Yes	Voluntarily dismissed.
76	Sequenom, Inc.	08/15/2016	S.D.Cal.	No	Claims by tendering shareholders; motion to dismiss pending. Ongoing.

75	Outerwall, Inc.	08/12/2016	W.D.Wash.	No	Damages claim on behalf of tendering shareholders; voluntarily dismissed after motion to dismiss was briefed.
74	Relypsa, Inc.	08/12/2016	N.D.Cal.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
73	Sagent Pharma., Inc.	08/09/2016	N.D.Ill.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
72	Heartware Int'l, Inc.	08/08/2016	D.Mass.	Yes	Dismissal via disclosure settlement with attorneys' fee after motion for TRO and preliminary injunction withdrawn.
71	QLogic Corp.	07/22/2016	C.D.Cal.	Yes	Voluntarily dismissed.
70	Skullcandy, Inc.	07/19/2016	D.Utah	Yes	Voluntarily dismissed after motion for TRO and preliminary injunction withdrawn. Motion for mootness attorneys' fee denied.
69	Ceres, Inc.	07/15/2016	C.D.Cal.	Yes	Dismissed for failure to prosecute.
68	Perrigo Co. plc	05/18/2016	D.N.J.	No	Damages claim by nontendering shareholders; parallel 10(b)/10b–5 open market purchaser claim; ongoing.
67	Hatteras Fin. Corp.	05/11/2016	M.D.N.C.	Yes	Dismissal via disclosure settlement with attorneys' fee after preliminary injunction motion withdrawn.
66	Ruckus Wireless, Inc.	05/11/2016	N.D.Cal.	No	Damages claim by tendering shareholders; dismissed for failure to plead misstatement/omission and scienter.
65	Fresh Market, Inc.	04/07/2016	D.Del.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
64	Zulily, Inc.	09/03/2015	W.D.Wash.	Yes	Dismissal via disclosure settlement with attorneys' fee.
63	Emulex Corp.	04/08/2015	C.D.Cal.	No	Damages claim by tendering shareholders; dismissed for failure to plead scienter; reversed; cert. granted; ongoing.
62	Valeant Pharma. Int'l, Inc. (Allergan, Inc.)	05/30/2014	C.D.Cal.	No	Section 14(e)/Rule 14e–3 insider-trading damages claims on behalf of sellers of Allergan stock; settled.
61	Chelsea Therapeutics Int'l Ltd.	05/30/2014	D.Del.	No	Damages claim by tendering shareholders; voluntarily dismissed after filing of opening brief on motion to dismiss.

60	Gentium S.p.A. ADS	01/15/2014	S.D.N.Y.	No	Damages claim by tendering shareholders; dismissed for failure to plead misstatement/omission and scienter.
59	Tellabs, Inc.	11/05/2013	N.D.Ill.	Yes	Dismissal via disclosure settlement with attorneys' fee.
58	Behringer Harvard REIT I, Inc.	09/17/2012	N.D.Tex.	No	Damages claim by nontendering shareholders; dismissed for failure to plead misstatement/omission, scienter, and loss causation.
57	BrightPoint, Inc.	07/24/2012	S.D.Ind.	N/A	Erroneously classified in database as a 14(e) case; complaint asserts 14(a) claims.
56	SRI Surgical Express Inc.	06/22/2012	M.D.Fla.	No	Claim for injunctive relief; dismissed as moot on motion to dismiss.
55	Cost Plus, Inc.	05/25/2012	N.D.Cal.	No	Motion for preliminary injunction denied; later dismissed via disclosure settlement with attorneys' fee.
54	ATS Corp. (Salient Federal)	03/06/2012	E.D.Va.	Yes	Stayed; voluntarily dismissed.
53	Micromet, Inc.	02/08/2012	D.Md.	Yes	Stayed; voluntarily dismissed.
52	Xcelera Inc.	02/06/2012	D.Conn.	No	Claims by tendering shareholders; parallel 10(b)/10b–5 claims; 14(e) claims dropped in amended complaint.
51	SuccessFactors, Inc.	01/05/2012	N.D.Cal.	Yes	Voluntarily dismissed.
50	Adolor Corp.	11/10/2011	E.D.Pa.	Yes	Stayed; voluntarily dismissed.
49	Petrohawk Energy Corp.	08/02/2011	S.D.Tex.	Yes	Voluntarily dismissed.
48	China Sec. & Surveillance Tech. Inc.	07/21/2011	D.Del.	Yes	Voluntarily dismissed.
47	Cal. Pizza Kitchen, Inc.	06/24/2011	C.D.Cal.	Yes	Voluntarily dismissed.
46	Orthovita, Inc.	06/01/2011	E.D.Pa.	Yes	Dismissal via disclosure settlement with attorneys' fee.
45	Impac Mortg. Holdings, Inc.	05/10/2011	C.D.Cal.	No	Damages claim by tendering shareholders; parallel 10(b)/10b–5 claim; voluntarily dismissed.
44	Orchid Cellmark Inc.	05/02/2011	D.N.J.	Yes	Voluntarily dismissed after filing of opening papers on motion for preliminary injunction and motion to dismiss.
43	Celera Corp. (Quest Diagnostics)	04/11/2011	N.D.Cal.	Yes	Voluntarily dismissed.

42	Beckman Coulter, Inc.	02/25/2011	C.D.Cal.	Yes	Dismissed for failure to prosecute.
41	Atheros Communications, Inc.	02/10/2011	N.D.Cal.	No	Original complaint contained injunctive 14(e) claim; dropped in amended complaint.
40	Lasercard Corp.	01/18/2011	N.D.Cal.	Yes	Voluntarily dismissed.
39	Genzyme Corp. (Sanofi-Aventis)	10/18/2010	D.Mass.	Yes	Voluntarily dismissed; later motion for mootness attorneys' fee denied.
38	Potash Corp. of Sask. Inc.	10/06/2010	N.D.Ill.	Yes	Voluntarily dismissed.
37	BlueLinx Holdings Inc.	09/30/2010	N.D.Ga.	Yes	Parties stipulated to mootness; court denied motion for mootness attorneys' fees and dismissed case.
36	Cogent Inc.	09/16/2010	C.D.Cal.	Yes	Voluntarily dismissed.
35	ICx Techs., Inc.	09/09/2010	E.D.Va.	Yes	Dismissal via disclosure settlement with attorneys' fee.
34	Penwest Pharma. Co.	08/26/2010	S.D.N.Y.	Yes	Voluntarily dismissed.
33	Superior Well Servs., Inc.	08/25/2010	W.D.Pa.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
32	ADC Telecomms., Inc.	07/28/2010	D.Minn.	Yes	Voluntarily dismissed.
31	Emmis Commc'ns Corp.	06/18/2010	S.D.Ind.	Yes	Voluntarily dismissed
30	Sembcorp Utils. Pte Ltd (Cascal N.V.)	06/07/2010	S.D.N.Y.	No	Damages claim by tendering shareholders; later voluntarily dismissed and motion for attorneys' fees denied.
29	Chordiant Software, Inc.	04/12/2010	N.D.Cal.	Yes	Voluntarily stayed; case later closed by court after no activity.
28	Novartis AG (Alcon, Inc)	01/11/2010	E.D.N.Y.	Yes	Voluntarily dismissed.
27	Trimeris, Inc.	10/21/2009	M.D.N.C.	Yes	Voluntarily dismissed.
26	Medarex, Inc.	07/31/2009	D.N.J.	Yes	Voluntarily dismissed.
25	Cox Radio, Inc.	04/08/2009	N.D.Ga.	Yes	Voluntarily stayed; terminated by the court.
24	Roche Holding, Ltd (Genentech)	02/23/2009	N.D.Cal.	Yes	Voluntarily stayed; then voluntarily dismissed.
23	Thornburg Mortg., Inc.	10/27/2008	D.N.M.	Yes	Voluntarily dismissed.

22	Citigroup Alternative Invs. LLC (Falcon Strategies)	05/20/2008	S.D.N.Y.	No	Voluntarily dismissed after motion for preliminary injunction denied.
21	Piedmont Office Realty Trust (f/k/a Wells Real Estate Inv. Trust)	10/25/2007	N.D.Ga.	No	Claims by nontendering shareholders; dismissed for failure to plead scienter; settled on appeal.
20	Converium Holding AG	05/01/2007	S.D.N.Y.	No[†]	Settled with payment of attorneys' fees after change in economic terms of tender offer.
19	WatchGuard Techs., Inc.	12/06/2006	W.D.Wash.	No	Damages claim by tendering shareholders; claim later dropped in amended complaint.
18	Erie Family Life Ins. Co.	06/01/2006	W.D.Pa.	No	Damages claim by tendering shareholders; later settled.
17	Capitol Bancorp	11/23/2005	N.D.Cal.	No	Damages claim by tendering shareholders; dismissed for failure to plead misstatement/omission and scienter; affirmed.
16	TXU Corp.	09/06/2005	N.D.Tex.	No	Damages claim by tendering shareholders; dismissed for failure to plead scienter; affirmed.
15	Fox Entm't Grp., Inc. (News Corp.)	02/08/2005	S.D.N.Y.	Yes	Voluntarily dismissed.
14	New York Cmty. Bancorp	09/24/2004	E.D.N.Y.	No	Damages claim by tendering shareholders; dismissed for failure to plead misstatement/omission.
13	Exxon Mobil Corp.	03/17/2004	D.N.J.	No	Damages claim by tendering shareholders; 14(e) claim later dropped and 10(b)/10b–5 claim added.
12	Starwood Hotels & Resorts Worldwide, Inc. (Westin Hotels)	11/18/2003	S.D.N.Y.	Yes	Voluntarily dismissed; motion for mootness attorneys' fees denied.
11	Digital Island, Inc.	01/22/2002	D.Del.	No	Damages claim by tendering shareholders; dismissed for failure to plead misstatements/omissions; affirmed.

[†] Even though little actual litigation activity occurred in this case, it is excluded from the "Yes" category, because the district court found that change in tender offer terms was significant and financially beneficial to stockholders, and the settlement in this case was thus not merely a "disclosure settlement."

10	Lincoln Co. LLC (Hartmarx Corp.)	10/10/2001	N.D.Ill.	No	Damages claims by open-market purchasers of Hartmarx stock who claimed harm from failed tender offer; parallel 10(b)/10b–5 claims; ultimately settled.
9	Spanlink Commc'ns, Inc.	04/13/2000	D.Minn.	No	Damages claims by tendering shareholders; ultimately settled.
8	Amway Asia Pac. Ltd.	12/16/1999	S.D.N.Y.	No	Damages claims by tendering shareholders; parallel 10(b)/10b–5 claims; dismissed for failure to plead misstatement/omission and reliance; affirmed.
7	United Techs. Corp.	07/27/1999	M.D.Tenn.	No	Damages claim alleging violation of Rule 14d–10; unclear if there was 14(e) claim; defendants' motion for summary judgment granted. (Complaint unavailable.)
6	Gabelli Grp. Cap. Partners (Gabelli Equity Trust, Inc.)	03/10/1998	S.D.N.Y.	No	Motion to dismiss argued and then denied as moot; mootness fee application settled and case voluntarily dismissed. (Complaint unavailable.)
5	Am. Bankers Ins. Grp., Inc.	01/28/1998	S.D.Fla.	No	After answer to complaint and class certification motion filed, case voluntarily dismissed as moot with payment of mootness attorneys' fee.
4	Gabelli Grp. Cap. Partners (Gabelli Global Multimedia)	08/28/1997	S.D.N.Y.	N/A	Erroneously classified in database as a 14(e) case; complaint asserts 14(a) claims.
3	FHP Int'l Corp.	04/02/1997	C.D.Cal.	No	Damages claims on behalf of tendering shareholders; motion to dismiss granted; appeal dismissed.
2	Hallwood Energy Corp.	11/15/1996	D.Colo.	No	Damages claims on behalf of tendering shareholders; settled after motion to dismiss was briefed.
1	BHP Copper, Inc. (Magna Copper Co.)	06/13/1996	D.Ariz.	No	Damages claims on behalf of tendering shareholders; 14(e) claim dismissed because there was no tender offer. (Complaint unavailable.)